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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

JOHN W. HILL,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation,
Respondent.

No. 665

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

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No. .....

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment and decision of the Supreme Court of Missouri, in a cause lately pending in said court styled and numbered John W. Hill, plaintiff-respondent, v. Terminal Railroad Association of St. Louis, a corporation, defendant-appellant, No. 40,558, by which the Supreme Court of Missouri enforced a remittitur of $10,000.00 from a judgment for $25,000.00 entered in petitioner's favor by the

Circuit Court of the City of St. Louis, Missouri, after enforced remittitur in said Circuit Court from a verdict of $37,721.00 (R. 189-190, 192, 192-193), in an action under the Federal Employers' Liability Act.

Division No. 1 of the Supreme Court of Missouri rendered its opinion and judgment on June 14, 1948 (R. 199-200), but the same were set aside and vacated, and the cause transferred to the Supreme Court of Missouri, En Banc, on July 12, 1948 (R. 205; Cf. **State v. Hamey**, 168 Mo. 167, 67 S. W. 620, 621 [1]. The Supreme Court of Missouri, En Banc, rendered an opinion and judgment on December 13, 1948 (R. 206-218) adopting the opinion in Division No. 1 of the Supreme Court of Missouri as the opinion of the Supreme Court of Missouri, En Banc. This petitioner, in due time, filed in the Supreme Court of Missouri, En Banc, his motion for a rehearing, or for alternative relief (R. 219-221), which was entertained, but was denied on January 7, 1949 (R. 221), at which time the Supreme Court of Missouri, En Banc, entered judgment enforcing remittitur as of December 21, 1948 (R. 221-222).

OPINIONS BELOW.

There was no opinion in the trial court.

The opinion of Division No. 1 of the Supreme Court of Missouri, subsequently adopted as its opinion by the Supreme Court of Missouri, En Banc, appears at pages 207-218, inclusive, of the printed record herewith filed. Such opinion is not yet officially reported, but is reported as **Hill v. Terminal Railroad Assn. of St. Louis**, 216 S. W. 2d 487.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 237 of the Judicial Code, as amended by the Act of June 25, 1948 (62 Stat. ..., 28 U. S. C., Section 1257).

The judgment of the Supreme Court of Missouri is a final judgment, rendered on January 7, 1949, as of December 21, 1948 (R. 221-222), being subject to no further review or correction by any other state court. It has ended the litigation between the parties by determining their rights so that nothing remains to be done by the trial court except the ministerial act of entering the judgment which the Supreme Court of Missouri has directed.

By definition of the Supreme Court of Missouri, its judgment constituted an "enforced remittitur." **Sofian v. Douglas**, 329 Mo. 258, 23 S. W. 2d 126; **Joice v. M.-K.-T. R. Co.**, 354 Mo. 439, 189 S. W. 2d 569.

Petitioner did not voluntarily seek a remittitur in order to avoid a new trial for an otherwise reversible error as in **Koenigsberger v. Richmond Silver Mining Co.**, 158 U. S. 41, 39 L. ed. 889; **Hansen v. Boyd**, 161 U. S. 397, 40 L. ed. 746; **Chesbrough v. Woodworth**, 244 U. S. 72, 61 L. ed. 1000.

In such cases, as occasionally under the Federal Employers' Liability Act, a verdict may be based upon a clearly erroneous mathematical computation or may be in excess of the amount to which the plaintiff is entitled as a matter of law. Cf. **Bartelbaugh v. Pennsylvania R. Co.** ... Ohio ..., 82 N. E. 2d 853. In this case the verdict represented an exercise of the jury's discretion to determine the amount to which petitioner was entitled. The basic question is the extent to which the exercise of this function may be undermined by redetermination in the appellate court.

The remittitur was in effect an enforcement by the Supreme Court of Missouri of its policy of maintaining a uniform measure of maximum damages in actions for damages for personal injuries, including actions brought under the Federal Employers' Liability Act. **Ford v. L. & N. R. Co.**, 355 Mo. 362, 196 S. W. 2d 163; **Mickel v. Thompson**, 348 Mo. 991, 156 S. W. 2d 721, 728; **Lynch v. Baldwin** (Mo. Sup.), 117 S. W. 2d 273.

Compliance with an erroneous judgment does not preclude its review. **O'Hara v. McConnell**, 93 U. S. 150, 23 L. ed. 840, and a judgment requiring a remittitur is adverse to the party required to remit. See **Alexander v. Cosden Pipe Line Co.**, 290 U. S. 484, 78 L. ed. 452. Where a plaintiff has consented to an enforced remittitur, the judgment enforcing the remittitur is final. See Robertson & Kirkham, The Jurisdiction of the Supreme Court of the United States, Section 24. Cf. **Union Pacific Railroad Co. v. Hadley**, 246 U. S. 330, 62 L. ed. 751; **Minneapolis & St. Paul Railway v. Moquin**, 283 U. S. 520, 75 L. ed. 1243.

Petitioner, at the first opportunity for him so to do, specifically set up and claimed a right, privilege and immunity under the Federal Employers' Liability Act, for, in his brief as respondent in Division No. 1 of the Supreme Court of Missouri (which brief is filed with the Clerk of this Court as Exhibit B to this petition),[1] in answer to the brief of respondent here as appellant in said court (which brief is filed with the Clerk of this Court as Exhibit A to this petition),[1] this petitioner specifically asserted (Exhibit B hereto, pp. 12-13):

> "Under the federal rule the question of whether the verdict of the jury is excessive is not for the courts

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1 These briefs were duly filed in the Supreme Court of Missouri, pursuant to Rule 1.08 of that Court, requiring the contentions to be urged on appeal to be stated therein; Cf. R. 198, 199, 205, 206.

on appeal and this rule appears to be controlling in the state courts."

and, further (Exhibit B hereto, p. 18):

"Cases arising in the state courts under the Federal Employers' Liability Act must be settled according to the general principles of law administered in the federal courts. In the federal courts the question of whether a verdict is excessive cannot be considered by an appellate court. Therefore, in cases arising in a state court under the Federal Employers' Liability Act, an appellate court cannot consider whether the verdict is excessive."

Petitioner thereafter preserved his claim under the Federal Employers' Liability Act in the Supreme Court of Missouri En Banc, for in his supplemental brief there filed (which brief is filed with the Clerk of this Court as Exhibit E to this petition),[1] he again made substantially the same assertions (Cf. Exhibit E, pp. 3, 7-10).

The Supreme Court of Missouri did not specifically pass upon petitioner's claim in its opinion (R. 207-218), but it inferentially denied said claim in its said opinion by holding that the damages awarded petitioner were excessive, and by ordering an enforced remittitur as a condition to the affirmance of petitioner's judgment (R. 217-218).

Petitioner further preserved his said claim after rendition of the opinion and decision of the Supreme Court of Missouri, first in petitioner's motion for a rehearing filed in Division No. 1 of that court on June 24, 1948 (R. 200-202, 205) and, finally, in his motion for rehearing filed in that court en banc on December 21, 1948 (R. 218-221), which was overruled on January 7, 1949 (R. 221).

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[1] These briefs were duly filed in the Supreme Court of Missouri, pursuant to Rule 1.08 of that Court, requiring the contentions to be urged on appeal to be stated therein; Cf. R. 198, 199, 205, 206.

Since this action was brought under the Federal Employers' Liability Act, and since the Supreme Court of Missouri undertook to determine that the damages awarded to the petitioner by the trial court were "excessive", a federal question was necessarily passed upon by the Supreme Court of Missouri.

To determine otherwise would in effect confer upon the state courts, in cases arising under a federal statute, the power to prevent any review of their determinations that damages awarded by juries and trial courts were "excessive". The alternative to an enforced remittitur is a reversal and a new trial, and this Court has ruled that reversal upon a refusal to consent to an enforced remittitur is not reviewable because of a lack of finality. **Mississippi Central Railroad Company v. Smith,** 295 U. S. 718, 79 L. ed. 1673. Therefore, no other means of review would be available. It is submitted that in the present case the judgment of the Supreme Court of Missouri was final

> "when it ended the litigation by fully determining the rights of the parties, so that nothing remained to be done by the lower court except the ministerial action of entering the judgment which the appellate court had directed."

Department of Banking v. Pink, 317 U. S. 264, 87 L. ed. 254.

QUESTIONS PRESENTED.

1. In an action under the Federal Employers' Liability Act, is the highest appellate court of a state authorized to review and redetermine the damages determined by the jury and the trial court where no reversible error was committed in the trial and where the verdict did not result from passion, prejudice or corruption and did not reflect

some error of law in the admission of evidence or in the charge of the trial judge?

2. In an action under the Federal Employers' Liability Act, is the highest appellate court of a state authorized, in the guise of determining the "excessiveness" vel non of the damages fixed by the jury and the trial court, to establish maximum limits upon the amount of damages recoverable for personal injuries where no such maximum limits are fixed by the federal statute?

SUMMARY STATEMENT.

Petitioner, plaintiff in the trial court, instituted an action under the Federal Employers' Liability Act in the Circuit Court of the City of St. Louis, Missouri, on August 8, 1946 (R. 1). The case was tried by a jury which returned a verdict in petitioner's favor for $37,721.00, upon which judgment was entered (R. 6, 188-189). Respondent filed a motion for a new trial alleging, among other grounds, that the verdict was excessive (R. 190-191). The trial judge required a remittitur of $12,721.00, as a condition of overruling respondent's motion for new trial, thus reducing the judgment to $25,000.00, which judgment was entered (R. 192-193). From this judgment respondent appealed to the Supreme Court of Missouri (R. 193-195). Petitioner, respondent in the Supreme Court of Missouri, denied the authority of that court to redetermine the amount of damages assessed by the jury and the trial court, under the Federal Employers' Liability Act, in the absence of passion, prejudice or corruption or some error of law. Cf. Reference to briefs filed by this petitioner ante, p. 4. Nevertheless, Division 1 of the Supreme Court of Missouri, finding all of respondent's allegations of error to be without merit save that the verdict was "excessive," ordered a remittitur of $10,000.00 from the

judgment of the trial court—thus reducing it from $25,000.00 to $15,000.00—within 10 days thereafter on penalty of reversal and remand for new trial (R. 199-200, 218).

Petitioner moved to set aside the enforced remittitur and to affirm unconditionally the judgment of the trial court, or, in the alternative, that a rehearing be granted, or that the case be transferred to the court en banc (R. 200-202). Petitioner's motion was overruled but respondent's motion to transfer to the court en banc was sustained (R. 204, 205). Petitioner again challenged the authority of the Supreme Court of Missouri to redetermine the amount of damages (Cf. Reference to petitioner's supplemental brief, ante, p. 5). The court en banc adopted the opinion of Division 1 on December 13, 1948 (R. 206-218). On December 21, 1948, petitioner moved the Supreme Court of Missouri en banc to set aside the enforced remittitur and to affirm the judgment of the court unconditionally or to grant petitioner a rehearing (R. 218-221). In the event neither alternative of the motion was granted, petitioner consented to remit $10,000.00 (R. 221). On January 7, 1949, petitioner's motion was overruled (R. 221). On January 7, 1949, upon motion of petitioner, the mandate of the Supreme Court of Missouri was ordered stayed for 90 days (R. 221-223).

The following evidence was presented with regard to the injuries sustained by petitioner: At the time of the injury petitioner was 50 years old (R. 7), in good health (R. 8), had sufficient seniority as an employee of respondent and was earning more than $300.00 per month (R. 8-9). At the time of the trial petitioner's life expectancy was 20 2/10 years (R. 126). He had sustained injuries to his right foot, his nerves and to his nervous system (R. 13; 132; 138). Three of his toes were fractured, with lacera-

tions and tearing of the soft tissue about the toe (R. 85; 130-131). All of the great toe and part of the second toe were amputated (R. 85-86); the fracture of the third toe had not healed and the evidence indicated it probably would not heal without surgery (R. 86; 87). An infection developed, which required trimming in the area of the stumps of the amputated toes (R. 13). The nerves to the amputated toe were caught in the scar tissue causing neuroma which caused extreme tenderness and pressure (R. 89-90; 139). There was very little padding over the stumps of the amputated toes and the scar tissue where the great toe was amputated adhered to the bone (R. 89; 131). The stub of the second toe, about one-fourth of an inch long, was pulled upward and backward so that petitioner could not bring or keep it down (R. 88). Petitioner walked with a limp favoring the right foot, used a cane for assistance, and the toe of the shoe on the right foot was cut out (R. 88). Physicians testified that the end of the amputated big toe should be dissected away, the stump of the second toe should be removed, and new tissue from the left leg transplanted (R. 89-90). Petitioner had earned nothing since his injury (R. 14), and the physicians stated that petitioner would never be able to walk a great distance or perform any labor which involved his being on his weight or walking on rough ground (R. 90-91; 132-133). Respondent offered evidence to the effect that petitioner would be able to work and that two other persons with amputated toes were able to work as switchmen (R. 143; 153-157).

REASONS FOR GRANTING THE PETITION.

1. The Supreme Court of Missouri has decided a federal question of substance not heretofore determined by this Court.

2. The Supreme Court of Missouri has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court, and particularly not in accord with the decisions of this Court in **Lavender v. Kurn**, 327 U. S. 645, 90 L. ed. 916, and **Chesapeake & O. R. Co. v. Kelly**, 241 U. S. 485, 60 L. ed. 1117.

3. The Supreme Court of Missouri has rendered a decision, on a federal question of substance, which conflicts with the decisions of other state appellate courts dealing with the same question.

This Court has never specifically defined the limitations which federal law imposes upon the authority of the appellate courts of the states to review and reverse for "excessiveness" verdicts of juries and judgments of trial courts in actions instituted under the Federal Employers' Liability Act.[2] At the outset it must be emphasized that this is not a case in which the alleged excessiveness of a verdict is attributable to passion, prejudice or corruption upon the part of the jury. No such argument was made and if made sub silentio was not accepted by the Supreme Court of Missouri, as there is nothing in the opinion of the Supreme Court of Missouri which indicates that the verdict was attributable to passion or prejudice.

This Court has held that in actions brought in the state courts under the Federal Employers' Liability Act, the measure of damages, being inseparably connected with the right of an action, is a matter of federal law and must be settled in accordance with the principles of law as administered in the federal courts. **Chesapeake & O. R. Co. v. Kelly**, 241 U. S. 485, 60 L. ed. 1117.

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[2] It should be noted that petitioner has been subjected to a double remittitur in this case — one by the trial court and one by the Supreme Court of Missouri. The decision of the Supreme Court of Missouri, therefore, invades not merely the province of the jury, but that of the trial judge.

Furthermore, this Court has held that the amount of damages sustained by a plaintiff is an issue of fact for the jury to determine in the same manner as the facts relating to existence of liability itself. **Dimick v. Scheidt,** 293 U. S. 474, 79 L. ed. 603; and this Court has further held in **Lavender v. Kurn,** supra, that in actions brought under the Federal Employers' Liability Act, the appellate courts of the state may not on appeal redetermine the issues of fact which have been determined by the jury.[3]

Under the general principles of law as administered in the federal courts which, under the **Kelly** case the state courts are obliged to follow, the alleged "excessiveness" of the damages, in the absence of passion and prejudice, cannot be reviewed by the appellate court. This rule is specifically applicable to actions brought under the Federal Employers' Liability Act. **Searfoss v. Lehigh Valley R. Co.,** 76 F. 2d 762 (C. C. A. 2); **Armit v. Loveland,** 115 F. 2d 308 (C. C. A. 3); **Grand Trunk Western Ry. Co. v. Boylan,** 81 F. 2d 91 (C. C. A. 7). Cf. **Fairmont Glass Works v. Cub Fork Coal Company,** 287 U. S. 474, 77 L. ed. 439; **Miller v. Maryland Casualty Company,** 40 F. 2d 463 (C. C. A. 2). See **Southern Railway Company v. Montgomery,** 46 F. 2d 990 (C. C. A. 5); **Jacque v. Locke Insulator Corporation,** 70 F. 2d 680 (C. C. A. 2); **Peitzman v. City of Illmo,** 141 F. 2d 956 (C. C. A. 8).

It is clear from the decision and language of this Court in **Minneapolis & St. Paul Railroad Co. v. Moquin,** 283 U. S. 520, 75 L. ed. 1243, that this is no mere matter of "procedure" to be governed by the law of the forum. In the **Moquin** case, which was an action under the Federal Employers' Liability Act in the state court, a verdict for the plaintiff was rendered which the petitioner-

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[3] And, since the trial court sustained the verdict to the extent of $25,000, the issue of fact had been determined not only by the jury but the trial judge as well.

defendant moved to set aside on the ground that the verdict had resulted from an improper appeal to passion and prejudice on the part of plaintiff's counsel. The state's supreme court held the verdict excessive on this ground and ordered remand and reversal for a new trial, unless the petitioner-plaintiff should consent to a remittitur. This Court, reversing the judgment of the state supreme court, held it error to enforce a remittitur, directing instead a remand for a new trial. This Court stated:

> "Nor need we inquire into the rules applicable in trials under state law. Whether under the state's jurisprudence the present record would entitle petitioner to a new trial or to such a conditional order as was awarded is immaterial. . . ."

The only intimation to the contrary is that contained in Mr. Justice Holmes' dictum in **Union Pacific Railroad Co. v. Hadley**, 246 U. S. 330, 62 L. ed. 751 (1918). In that case, which was an action brought in the state court under the Federal Employers' Liability Act, the defendant appealed to the state court which ordered a remittitur as a condition of affirmance. The defendant brought the case to this Court, claiming that the State Supreme Court was required as a matter of law to reverse and remand for a new trial. In the course of an opinion by Mr. Justice Holmes, which rejected the defendant's contention, this Court stated, *obiter,*

> "The court had the right to require a remittitur if it thought, as naturally it did, that the verdict was too high."

Examination of the opinion of the State Supreme Court in the **Hadley** case makes it clear that the alleged excessiveness of the verdict as referred to by Mr. Justice Holmes was based not upon the grounds urged in the instant case, but upon the fact that the jury had not taken

account of the plaintiff's contributory negligence, and that the verdict was thus erroneous as a matter of law.[4]

The **Hadley** case presented a far different situation from that which obtains in the instant case in which the Supreme Court of Missouri has undertaken, in the absence of any error of law by the trial court, to enforce a "rule of uniformity" by which maximum amounts are set for recovery for particular types of injuries.[5] This in effect constitutes an enforcement by the state appellate court of a policy for which the federal statute does not call. Indeed, a state statute limiting the amount of recovery for wrongful death or particular injuries is not applicable in an action under the Federal Employers' Liability Act. **C. R. I. & P. R. Co. v. Devine**, 239 U. S. 52, 60 L. ed. 140. By similar reasoning it is not admissible for appellate courts of the state to impose rules of law as to the measure of damages which in effect limit the amount recoverable under a federal statute in a manner directly contrary to the rules of law prevailing in the federal courts.

It is respectfully urged that this case raises an important question in the application and interpretation of

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4 The Court, in Mr. Justice Holmes' opinion, stated at 246 U. S. 330, 333, 62 L. ed. 751, 755:

> "The court, after instructing the jury that Cradit assumed the ordinary risks of his employment, but not extraordinary ones, in a form that is not open to criticism here, instructed them further that he was guilty of contributory negligence, and that, under the statute, if the jury found it necessary to consider that defense, his negligence was to go by way of diminution of damages in proportions explained. The jury, in answer to a question, found that nothing should be deducted for the negligence of the deceased, and found a verdict for $25,000, which was cut down to $15,000 by the trial court, and to $13,500 by the supreme court. There were intimations that the jury disregarded the instructions of the court, and on that footing the defendant claims the right to a new trial in order that the jury may determine the proper amount to be deducted, since that was a matter that the court had no right to decide."

5 Joice v. M.-K.-T. R. Co., 354 Mo. 439, 189 S. W. 2d 568, 576-577; Goslen v. Kurn, 351 Mo. 395, 173 S. W. 2d 79, 89-90; Mooney v. T. R. R. Assn. of St. Louis, 353 Mo. 1080, 186 S. W. 2d 450, 455-456; Aly v. T. R. R. Assn. of St. Louis, 342 Mo. 1116, 119 S. W. 2d 363; Harlan v. Wabash R. Co. (Mo. Sup.), 73 S. W. 2d 749, 759.

the Federal Employers' Liability Act by the state courts which should be determined by this court for the guidance of the state tribunals. Many of the state courts follow the federal rule which permits reversal or enforced remittitur of the lower court's judgment only where the "excessiveness" of the verdict results from passion or prejudice, or from some error of law in the trial of the case. Karberg v. Southern Pac. Co., 12 Cal. App. 2d 200, 52 P. 2d 285-293; Sherman v. So. Pac. Co., Cal. App., 93 P. 2d 812-818; Atlantic Coast Line R. Co. v. Tomlinson, 21 Ga. App. 704, 94 S. E. 909, 910; Western & A. R. R. v. Lochridge, 39 Ga. App. 246, 146 S. E. 776, 782-783; Ga. 152 S. E. 475, 482; Pittsburgh, C. C. & St. L. R. Co. v. Smith, 190 Ind. 656, 131 N. E. 517; Ill. Cent. R. Co. v. Cheek, 152 Ind. 663, 53 N. E. 641, 646; Slatinka v. U. S. Ry., Admr., 194 Ia. 159, 188 N. W. 20, 25-26; Steele v. Atl. Coast Line R. Co., 103 S. C. 102, 87 S. E. 639, 644; Smith v. So. Ry. Co., 207 S. C. 179, 35 S. E. 2d 225; Pryor v. Safeway Stores, 196 Wash. 382, 83 P. 2d 241-244; Simons v. Kalin, 10 Wash. 2d 409, 116 P. 2d 840, 846; Musgrove v. Manistique & L. S. Ry. Co., 259 Mich. 469, 244 N. W. 132; L. & N. R. Co. v. Jolly's Admx., 232 Ky. 702, 23 S. W. 2d 564, 571. In a few other states appellate courts redetermine the amount of damages but, except possibly in Arkansas, no "uniform maximum" for particular injuries has been established. L. & N. R. Co. v. Parker, 223 Ala. 626, 138 So. 231, 250; L. & N. R. Co. v. Grizzard, Ala., 189 So. 203; C. R. I. & P. R. Co. v. Caple, Admr., 207 Ark. 52, 61, 179 S. W. 2d 151; Mo. Pac. R. R. Co. v. McKaney, 205 Ark. 907, 917, 171 S. W. 2d 932; Chi., R. I. & P. Ry. Co. v. Brooks, 155 Okla. 53, 11 P. 2d 142. The practice of the Supreme Court of Missouri, if unchecked, is certain to create confusion and uncertainty as to the proper practice in all the states. Cf. Stott v. Thompson, Tr., 294 Ill. App. 450, 14 N. E. 2d 246, 254; Avance v. Thompson, 320 Ill. App. 406, 51 N. E. 2d 334, 340; Joice v. M.-K.-T. R. Co., 354 Mo. 439, 189 S. W.

2d 568, 576; Jones v. Pennsylvania R. Co., 354 Mo. 439, 182 S. W. 2d 157, 158-159, and Heminghaus v. Ferguson (Mo. Sup.), 215 S. W. 2d 481, 485-486.

Regardless of the ultimate decision on the merits, the issue in this case merits discussion and elucidation by this Court. If not only the courts of the various states, but state and federal courts sitting in the same state, are to assign varying degrees of finality to the verdict of a jury and the judgment of a trial court, all in actions arising under a single federal statute, confusion and uncertainty are certain to multiply. The problem is one which clearly calls for an exercise of this Court's jurisdiction under Rule 38.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

JOHN W. HILL,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Respondent.

No. 665.

BRIEF FOR RESPONDENT

In Opposition to Petition for Certiorari to the Supreme Court of Missouri.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

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BRIEF FOR RESPONDENT

In Opposition to Petition for Certiorari to the Supreme Court of Missouri.

OPINION BELOW.

The opinion of Division One of the Supreme Court of Missouri, subsequently adopted en banc, will be found in the record beginning at page 207. It has not yet been officially reported.

STATEMENT.

Petitioner's action is under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51) to recover damages for personal injuries. A jury trial resulted in a verdict for petitioner in the sum of Thirty-seven Thousand Seven

Hundred and Twenty-one Dollars ($37,721.00) (R. 188, 189). The trial court found that the verdict was grossly excessive and was the result of passion and prejudice against respondent, and ordered that unless petitioner would remit Twelve Thousand Seven Hundred and Twenty-one Dollars ($12,721.00) of the verdict a new trial should be granted (R. 192). Petitioner remitted this sum (R. 192), respondent's motion for a new trial was overruled, and judgment was entered in petitioner's favor for the sum of Twenty-five Thousand Dollars ($25,000.00) (R. 192, 193).

Upon appeal to the Supreme Court of Missouri the cause was heard in Division One which ordered the judgment reversed and remanded for a new trial unless petitioner would make a further remittitur of Ten Thousand Dollars ($10,000.00) (R. 218).

> "Considering the evidence favorable to respondent (petitioner in this Court), the verdict is grossly excessive. The trial court ordered a remittitur, but we think the amount remaining is still grossly excessive. If plaintiff will remit $10,000 additional within ten days, the judgment will stand affirmed for $15,000. Otherwise the judgment will stand reversed and the cause will be remanded for a new trial" (R. 218).

Thereupon petitioner "remits $10,000.00 from the judgment herein in accordance with the aforesaid order of this Court" (R. 202). Upon the adoption by the Court en banc of the divisional opinion, petitioner again entered his remittitur in the mentioned sum, and in the same words as hereinabove set out (R. 221).

Petitioner now seeks to have this Court review the action of the Supreme Court of Missouri in ordering a reversal and remanding of this cause unless petitioner remitted $10,000 of the judgment.

SUMMARY OF THE ARGUMENT.

I.

By choosing to enter a remittitur, rather than retry his case, petitioner waived his right to attack the decision of the Supreme Court of Missouri. He cannot retain the benefit of the affirmance of his judgment, which occurred at the time of his entry of the remittitur, and at the same time repudiate his own action which alone made such affirmance possible.

Koenigsberger v. Richmond Silver Mining Co., 158 U. S. 41, 39 L. Ed. 889;

Woodworth v. Chesbrough, 244 U. S. 79, 61 L. Ed. 1005.

II.

There is no federal question presented by the petition herein.

(a) In suits of this character all questions involving substantive law must be determined by the federal law on the subject; whereas questions involving procedure must be decided by the state law.

Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. Ed. 1433.

(b) No question of substantive law is presented by the record here. Under Missouri practice one of the necessary requisites for the finality of a verdict for damages for personal injuries is approval by the trial court, and, upon appeal, by the appellate court. This is the state method of determining not whether, but how much, a plaintiff is entitled to recover in a case arising under the Federal Employers' Liability Act.

The question posed by petitioner is, therefore, of necessity a procedural one.

Joice v. M.-K.-T. R. Co., 354 Mo. 439, 189 S. W. 2d 568, 576;

Avance v. Thompson, 320 Ill. App. 406, 51 N. E. 2d 334, 340;

Roy v. Oregon Short Line R. Co., 55 Idaho 404, 42 P. 2d 476 (Cert. denied, Oregon Short Line R. Co. v. Roy, 296 U. S. 479, 80 L. Ed. 409);

Union Pac. R. Co. v. Hadley, 246 U. S. 330, 62 L. Ed. 751, 755.

(c) The action of the Missouri Supreme Court herein is just as much a part of that state's method of determining petitioner's rights under the Federal Employers' Liability Act as is the Missouri practice of permitting three-fourths of the members of the trial jury to return a verdict, Minnesota's practice of permitting five-sixths of the members of a trial jury to return a verdict, or Florida's practice of permitting a jury of fewer than twelve to return a verdict.

M. & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. Ed. 961;

C. & O. R. Co. v. Kelly, 241 U. S. 485, 587, 60 L. Ed. 1117, 1121;

C. & O. R. Co. v. Carnahan, 241 U. S. 241, 242, 60 L. Ed. 979, 981.

(d) But even if the question raised by the petition were one of substance, the opinion attacked does not run counter to the law as announced in the federal courts; and therefore there is no federal question involved here. It is not the federal law that a federal court of appeals lacks jurisdiction to disapprove an excessive verdict.

Koenigsberger v. Richmond Silver Mining Co., supra;

Woodworth v. Chesbrough, supra;
Virginian R. Co. v. Armentrout (4), 166 F. 2d 400, 408.

As approval by a state appellate court is one of the steps in the enforcement of plaintiff's right, so is the approval by a federal court of appeals one of the steps in the enforcement of plaintiff's right. It may be that the power of approval in the one case is supported by slightly different reasoning and is exercised in a different manner; but the point is that the right exists in both instances. So long as it exists in both courts the manner of its exercise becomes procedural.

ARGUMENT.

I.

The Supreme Court of Missouri determined, as it had a right under state law to do, that the damages awarded to the petitioner in the trial court were excessive. The well-established practice in the Missouri appellate courts, where it is found that a judgment is excessive and the error can be cured by remittitur, is to reverse and remand for a new trial unless a remittitur shall be filed. Joice v. M.-K.-T. R. Co., 354 Mo. 439, 189 S. W. 2d 568; Jones v. Pennsylvania R. Co., 354 Mo. 439, 182 S. W. 2d 157.

If petitioner had chosen not to enter the remittitur, the cause would have been reversed and remanded for a new trial (R. 217-218) and petitioner, as he concedes (Brief, p. 6), would have had no right of review in this Court because of the lack of a final judgment. Petitioner, however, seeks to create a right of review where none would otherwise exist, by the expedient of voluntarily converting the non-appealable, conditional judgment or order of the Supreme Court of Missouri into a final judgment through voluntarily accepting the terms thereof, i. e., entering his remittitur, and then, after having the judgment made final in this manner, rejecting the condition upon which it became final. Petitioner seeks to accept the benefit of the action of the Supreme Court of Missouri in affirming the judgment by maintaining a tight grasp upon the $15,000.00 for which it was affirmed with one hand, while with the other he attacks the sole condition upon which he was permitted to keep the $15,000.00. In short, petitioner is endeavoring to retain the benefit of the Court's action while avoiding the detriment, even though the sole condition upon which he was allowed to retain it was his acceptance of the detriment.

Petitioner voluntarily entered a remittitur in order to avoid a new trial ordered for an otherwise reversible error, and by so doing waived his right to object. Koenigsberger v. Richmond Silver Mining Co., 158 U. S. 41, 39 L. Ed. 889; Woodworth v. Chesbrough, 244 U. S. 79, 61 L. Ed. 1005.

The principle controlling in the instant case is set out in the Koenigsberger case, supra. In that case the plaintiff recovered a judgment in the trial court. On appeal the judgment was affirmed for one-half the amount of the verdict, provided the plaintiff would consent to remit the balance within ten days. Thereupon plaintiff filed a remittitur for one-half the amount of the judgment and each party sued out a writ of error.

This Court, speaking through Mr. Justice Gray, said:

> "The plaintiff, by not insisting on the alternative, allowed him by the court, of having a new trial of the whole case, but electing the other alternative allowed, of filing a remittitur of half the amount of the original judgment, and thereupon moving for and obtaining an affirmance of that judgment as to the other half, waived all right to object to the order of the court, of the benefit of which he had availed himself."

In Woodworth v. Chesbrough, supra, this Court again announced the same principle now contended for by respondent. In that case plaintiff had recovered a judgment and verdict in the trial court which the appellate court decided was excessive. Plaintiff was permitted, in order to avoid a retrial, to file a remission of the excess. The remittitur recited that it was done in compliance with the opinion of the appellate court

> "for the sole purpose of obtaining an entry of final judgment . . . and of securing the affirmance of

> that part of the judgment which is not so remitted, and is intended to be without prejudice to plaintiff in any cross proceeding hereafter prosecuted by him before the Supreme Court of the United States . . . in connection with any proceeding prosecuted in that court by defendant for the purpose of reviewing said judgment of the Circuit Court of Appeals."

In assertion of the right thus attempted to be reserved, plaintiff sued out a writ of error. This Court sustained a motion to dismiss, saying that:

> "Woodworth is in the somewhat anomalous position of having secured a judgment against Chesbrough, and yet seeking to retract the condition upon which it was obtained. This he cannot do. (Citing the Koenigsberger case, supra.) He encounters, besides, another obstacle: **If the remittitur be disregarded, the judgment entered upon it must be disregarded and the original judgment of the Circuit Court of Appeals restored; which, not being final, cannot be reviewed.**" (Emphasis supplied.)

Petitioner impliedly concedes the validity of the principle announced in the Koenigsberger and Woodworth cases, supra, but says (Brief p. 3) that a distinction is to be made because he did not seek permission to file a remittitur as was done in those cases. He claims, in effect, that this takes his case out of the general rule.

The short answer to that contention is that the facts are not as stated in his brief. In the Koenigsberger Case the judgment was that plaintiff could enter a remittitur or retry his case. He chose the remittitur. In the Woodworth Case the judgment was one of reversal and remanding, and plaintiff sought and obtained permission of the court to enter a remittitur rather than retry his case. It

is clear that there is not the slightest distinction to be made between this case and either the Koenigsberger or the Woodworth Case.

Petitioner assigns no valid reason why there should be an exception to that rule nor can he do so. He voluntarily chose to forgive a portion of his judgment rather than hazard all upon a retrial.

II.

Petitioner's contention is that in actions arising under the Federal Employers' Liability Act, state appellate courts have no authority or jurisdiction in excessive verdict cases to require a remittitur as a condition of affirmance of the judgment. The basis of this contention is that such action allegedly involves a question of substantive law which must be determined in accordance with the principles of law as administered in the federal courts; that federal appellate courts cannot, in such cases, require a remittitur as a condition of affirmance, and that, therefore, state appellate courts should not be permitted to do so.

(a) It is, of course, well established that in actions in the state courts arising under the Federal Employers' Liability Act, all questions of substantive law must be decided in accordance with federal rules of decisions, whereas questions of procedural law may be decided in accordance with the state law. Central Vermont R. Co. v. White, 238 U. S. 501, 511, 59 L. Ed. 1433, 1436.

By definition, "practice" and "procedure" are generally understood to include the mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or declares the right. Barker v. St. Louis County, 340 Mo. 986, 104 S. W. 2d 371, 377, 378.

The petitioner in this case had certain legal rights under the Federal Employers' Liability Act. The enforcement of these legal rights is committed concurrently to the state courts. The method of enforcement of these rights, however, is not prescribed by the Act and it follows, therefore, that the hearing and determination of petitioner's case, not only in the trial court, but also on appeal, must be had in accordance with the rules, principles and precedents governing the practice in the state court.

(b) The final step in the enforcement of a plaintiff's legal right is the affirmance, by the highest appellate court having jurisdiction, of a judgment in his favor. Under the practice in Missouri, as well as in other states, before this final step is taken, the appellate court has the right to determine whether the damages awarded are so excessive as to constitute reversible error, and if it finds that they are, it may require a remittitur of the excess as a condition of affirmance. Joice v. M.-K.-T. R. Co., supra; Jones v. Pennsylvania R. Co., supra. A choice is thus afforded a plaintiff of trying the case over or of curing the otherwise reversible error by remitting the portion of the damages found to be excessive. Such action in no way impairs or interferes with a plaintiff's right to recover a judgment, but is merely one step in the enforcement of his right. It is clearly, therefore, a matter of procedural law to be governed by state law. Union Pacific R. Co. v. Hadley, 246 U. S. 330, 62 L. Ed. 751; Joice v. M.-K.-T. R. Co., supra; Avance v. Thompson, 320 Ill. App. 406, 51 N. E. 2d 334; Roy v. Oregon Short Line R. Co., 55 Idaho 404, 42 P. 2d 476, cert. den. Oregon Short Line R. Co. v. Roy, 296 U. S. 579, 80 L. Ed. 409.

This Court has recognized that the action of a state court in requiring a remittitur as a condition of affirmance in a Federal Employers' Liability Act case is one involving

a question of procedural law. Union Pacific R. R. Co. v. Hadley, supra. That case arose under the Federal Employers' Liability Act and was tried in a Nebraska state court. The trial court reduced plaintiff's verdict from $25,000 to $15,000 and on appeal the Supreme Court of Nebraska ordered a retrial unless a further remittitur was made, thereby reducing the judgment to $13,500. The case was brought to this Court and this Court, through Mr. Justice Holmes, said of the action of the Supreme Court of Nebraska:

> "The court had the right to require a remittitur if it thought, as naturally it did, that the verdict was too high."

Clearly, such language would have been inappropriate had this Court considered the action of the state appellate court as having determined a substantive rather than a procedural question.

(c) Moreover, analogous cases may be cited in which it is recognized that the procedural phases of the enforcement of a plaintiff's legal right in a state court action arising under the Federal Employers' Liability Act are governed by state law. As this Court said, in L. & N. R. Co. v. Stewart, 241 U. S. 261, 60 L. Ed. 989:

> "The notion that a substantive right vesting under the law of one jurisdiction cannot be recognized and enforced in another—at least, as between the United States and a state—unless by procedure identical with that of the first, is disposed of in Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. Ed. 961 . . ."

In the Bombolis Case this Court held that a verdict concurred in by fewer than all of the jurors in a state action arising under the Federal Employers' Liability Act is

valid if proper under state law, even though federal courts in the same character of cases require unanimity. For similar holdings, see St. L. & S. F. R. Co. v. Brown, 241 U. S. 223, 60 L. Ed. 966; Minneapolis & St. L. R. Co. v. Winters, 242 U. S. 353, 61 L. Ed. 358; Chesapeake & O. R. Co. v. Gainey, 241 U. S. 494, 60 L. Ed. 1124. These holdings are based on the theory that the requirement of the Seventh Amendment to the Federal Constitution, that trial by jury shall be according to the common law—that is, by a unanimous verdict — does not control the state courts, even when enforcing rights under the Federal Employers' Liability Act, and that such courts may, therefore, give effect, in an action under that statute, to a local practice permitting a less than unanimous verdict. Minneapolis & St. L. R. Co. v. Bombolis, supra.

A federal jury consists of twelve members; nevertheless this Court, in C. & O. R. Co. v. Carnahan, 241 U. S. 241, 242, 60 L. Ed. 979, 981, approved the manner of determining damages in Federal Employers' Liability Act cases in the state courts of Florida, where but six persons compose a jury.

Similarly, this Court has held that a state appellate court, in an action arising under the Federal Employers' Liability Act, may grant a partial new trial in accordance with the state practice, or may direct a new trial as to the amount of damages only when affirming on the issue of negligence. Norfolk R. Co. v. Ferebee, 238 U. S. 269, 59 L. Ed. 1303.

(d) It is sometimes stated generally that a federal appellate court has no control over the amount of a verdict rendered in a trial court. Investigation will disclose that this statement is not correct. That power unquestionably resides in the court, but is used sparingly. In both the

Koenigsberger and Woodward cases, supra, trials had been had in federal courts. In both, excessive verdicts had been rendered in the trial courts. In the former the judgment was reversed and remanded unless plaintiff remitted a portion of the damages, while in the latter plaintiff asked for and was given leave to remit a portion of the damages.

It has long been the rule that, in the presence of passion and prejudice on the part of the jury against the losing litigant, the judgment will not be permitted to stand.

New York Central R. Co. v. Johnson, 279 U. S. 310, 73 L. Ed. 706;
Minneapolis & St. Paul R. Co. v. Moquin, 283 U. S. 520, 75 L. Ed. 1243.

The Fourth Circuit Court of Appeals holds, in Virginian R. Co. v. Armentrout, 166 F. 2d 400, 408, that failure of a trial judge to take action to reduce a grossly excessive verdict is an abuse of discretion and reversible error.

So, we have the federal rule that a court of appeals may reverse and remand in case of a verdict resulting from passion and prejudice, and where the trial judge approved an excessive verdict. Jurisdiction over the amount of the verdict is, then, in the federal appellate courts. Whether the action taken is an order of remittitur on pain of a new trial, or an order for a new trial, is merely a difference in the method of reaching the same result, viz., a reduction in the amount of the verdict; merely a difference in the method of enforcing the defendant's right to a lowering of the verdict against him.

Both the federal and state appellate courts have the power to determine the excessiveness of a verdict. Therefore, the manner in which it is exercised by a state court does not pose a question of substance, viz., a federal ques-

tion. It is mere quibbling to say that the method of correcting an excessive verdict is substantive rather than procedural.

Because petitioner's application raises no federal question, it should be denied.

Respectfully submitted,

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